Office-Supreme Court, U.S.
FILED
JUL 27 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2058

In the Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT W. BOUTZ, PETITIONER

v.

FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

LAWRENCE G. WALLACE
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Case:

Handler v. *Secretary of Labor*, 379 F. 2d 88 5

Regulations:

5 C.F.R. 335.102 (1973) 5

5 C.F.R. 752.104(a) (1973) 5

Miscellaneous:

FAA Handbook 3330.6 ..... 1, 2, 3, 4, 5, 6

FAA Handbook 3330.6A 1, 2, 5, 6

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2058

ROBERT W. BOUTZ, PETITIONER

v.

FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that he was improperly terminated from employment with the Federal Aviation Administration for refusing to accept a reassignment. He argues essentially that the termination was improper because the FAA relied on provisions of a revised FAA Handbook (3330.6A), which was inapplicable to him, instead of an earlier version of the FAA Handbook (3330.6), which was applicable.

1. In 1969 petitioner accepted a transfer from Tinker Air Force Base, Oklahoma, to the position of Electronics Engineer (Instructor) at the FAA Aeronautical Center in Oklahoma City, Oklahoma (the Academy) (Pet. App. A-49). In doing so, he signed FAA Form 3330-5 ("Employment Agreement for Academy Instructors"), which provided that he would remain as an instructor at the Academy for a period of two years, until April 1971. Form 3330-5 also incorporated by reference FAA Handbook 3330.6, which

was to govern petitioner's reemployment rights with the FAA (Pet. App. A-1 to A-3). Toward the end of his two-year period, petitioner signed a supplemental agreement (FAA Form 3330-5.1), which extended his employment as an instructor at the Academy for two more years, until April 1973. The FAA Handbook was again incorporated by reference (Pet. App. A-3 to A-4).

In March 1973, the FAA offered petitioner a GS-802-12 Engineering Technician position in Fort Worth, Texas, effective at the end of his second two-year tour of duty at the Academy (Pet. App. A-50). Petitioner objected to this assignment in letters to the Superintendent of the Academy dated April 9 and 16, 1973 (*id.* at A-13 to A-16). In the April 16 letter petitioner expressly refused the reassignment (*id.* at A-15). On May 4, 1973, the FAA informed petitioner that "no other alternatives to the position offered were available and that his assignment to that position was directed, with the caveat that refusal to comply with the directive might result in his separation from the service" (*id.* at A-50). The FAA set a time limit within which petitioner was to accept or decline the reassignment. On May 25, 1973, after receiving no response before expiration of the time limit, the FAA sent petitioner notice of his proposed separation from the service for "refusal to accept a position change within the FAA which would carry out the terms of the established administrative rights policy for Academy instructors" (*id.* at A-23). The notice also stated that neither Handbook 3330.6 nor Handbook 3330.6A provided for "the right of independent forfeiture of return rights at the end of the two 2-year tours of duty at the [Academy]" and that the FAA was "unwilling to accept such forfeiture" (*id.* at. A-24). In a letter dated June 28, 1973, the FAA removed petitioner from FAA employment effective July 6, 1973 (*id.* at A-43, A-50).

Petitioner sought administrative review of the FAA's decision. The Regional Office of the Civil Service Commission approved the FAA's removal action (Pet. App. A-42 to A-48) and the Civil Service Commission Appeals Review Board affirmed that decision (*id.* at A-49 to A-55). The Civil Service Commission declined to reopen or reconsider the Review Board's decision (*id.* at A-56 to A-65).

Petitioner then filed this action in the United States District Court for the District of Columbia.[1] The district court entered summary judgment for the FAA both on petitioner's claim for severance pay (Pet. App. A-67, A-69) and on his claim for reinstatement (*id.* at A-65 to A-66, A-68). The court of appeals affirmed without opinion (*id.* at A-70).

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of the other courts of appeals. Accordingly, further review is unwarranted.

a. The FAA's reassignment of petitioner was consistent with his employment agreement and with FAA Handbook 3330.6. Petitioner's initial employment agreement and his supplemental agreement specifically provided (Pet. App. A-1, A-4) that his reemployment rights with the FAA were to be governed by FAA Handbook 3330.6. FAA Handbook 3330.6, paragraph 42b (Pet. App. A-74; emphasis added) provided:

---

[1]Initially petitioner filed an action for severance pay in the United States District Court for the Western District of Oklahoma and an action for reinstatement and back pay in the United States District Court for the District of Columbia. The district court in Oklahoma granted the FAA's motion for summary judgment, but the Tenth Circuit reversed on the ground that the administrative record, which reflected that petitioner had been involuntarily separated, had not been filed with the district court. After remand, the severance pay suit was transferred to the District of Columbia (Pet. 10).

> After completing two tours of duty an eligible employee *shall be returned to his parent organization, except* as follows:
>
> (1) The employee, the Aeronautical Center, and the parent organization *may mutually agree* on a third tour and on the extension of reemployment rights for the duration of the third tour.
>
> (2) If the parent organization disapproves a third tour, the *employee may, with the concurrence of the Aeronautical Center*, forfeit reemployment rights and remain at the Academy.

Pursuant to this paragraph, an employee like petitioner, who has completed a second tour of duty at the Academy, may not decline unilaterally to renounce his reemployment rights and remain at the Academy as an instructor. Rather, FAA concurrence in an employee's desire to remain at the Academy is necessary. Otherwise, at the conclusion of his second tour of duty, the employee "shall be returned to his parent organization." Accordingly, the FAA's reassignment of petitioner to a GS-802-12 Engineering Technician position in Fort Worth, Texas,[2] was consistent with petitioner's contractual rights.[3]

---

[2]The position at Fort Worth, Texas, was with petitioner's parent organization and was at the same or a higher grade than that held by petitioner prior to accepting the Academy position, as required by Handbook 3330.6, paragraphs 39a, 42b and 43b (Pet. App. A-72, A-74, A-76).

[3]Petitioner contends (Pet. 19) that if Handbook 3330.6 is interpreted to permit the FAA to reassign him, paragraphs 41c and 42c(1) of the Handbook "become useless nulities [*sic*] * * *." Paragraph 41c (Pet. App. A-73) states:

> An employee who is eligible for reemployment rights must execute a new employment agreement within six months after the completion of his most recent tour of duty. Otherwise his reemployment rights expire.

Petitioner refused to accept the reassignment (Pet. App. A-15).[4] Because of his refusal, the FAA terminated petitioner's employment. Removal of petitioner for refusing to accept a reassignment was, as the Civil Service Commission found (*id.* at A-48, A-55), for the purpose of promoting the efficiency of the service. Hence, petitioner's removal was within the FAA's authority and consistent with Civil Service regulations. See 5 C.F.R. 335.102, 752.104(a) (1973); *Handler* v. *Secretary of Labor*, 379 F. 2d 88 (D.C. Cir. 1967).

b. Petitioner argues (Pet. 13-14, 24-25) that the FAA erroneously applied Handbook 3330.6A, which had not

---

It apparently is petitioner's position that under this paragraph he has the option of allowing his reemployment rights to expire and continuing at the Academy. Petitioner's argument is refuted, however, by paragraph 42b, which plainly provides that an employee who has completed two two-year tours of duty needs the concurrence of the Aeronautical Center to remain at the Academy. As the Civil Service Commission Appeals Review Board noted (Pet. App. A-55), "it is clear that [paragraph 41c] only states the rule that the right to return to the region will be lost if the employee does not return after completion of his last tour at the academy."

Paragraph 42c(1) similarly is of no avail to petitioner, since that paragraph, by its terms, applies only to those who have completed *three* tours of duty. Accordingly, it is in no way inconsistent with paragraph 42b, which defines the rights of an employee such as petitioner, who has completed only two tours of duty.

[4]Petitioner implies (Pet. 9) that he never refused the offered reassignment. In a letter dated April 16, 1973, however, petitioner stated (Pet. App. A-15):

> I hope that I will not be penalized for refusing to accept the job offered * * * but hereby do so.

Moreover, it is undisputed that petitioner did not make a decision concerning the proposed reassignment by the deadline set by the Academy (Pet. App. A-24 to A-25). In these circumstances, the Civil Service Commission's finding that petitioner rejected the offered reassignment is amply supported by the record and is not arbitrary, capricious, or an abuse of discretion.

been incorporated into his employment agreement, in concluding that he had no right to remain at the Academy following his completion of two two-year terms of duty there. He also asserts (Pet. 22-23) that he was not told that his removal was in accordance with Handbook 3330.6 as well as with Handbook 3330.6A until after his employment had been terminated, thus suggesting that the FAA's application of the provisions of Handbook 3330.6 to his case was only an afterthought. Both contentions are refuted by the record.

As early as February 7, 1973, the FAA notified petitioner that neither Handbook 3330.6 nor Handbook 3330.6A permitted him to remain at the Academy without the Academy's concurrence (Pet. App. A-6 to A-7). The notice of proposed termination issued by the Superintendent of the Academy on May 25, 1973, specifically stated (*id.* at A-23 to A-24):

> Neither regulation 3330.6 nor 3330.6A provides you the right of independent forfeiture of return rights at the end of two 2-year tours of duty at the Aeronautical Center and we are unwilling to accept such forfeiture.

In the letter finally terminating petitioner's employment the Superintendent also relied on Handbook 3330.6 as the basis for petitioner's return rights (Pet. App. A-37). Both the Civil Service Commission Appeals Review Board and the district court specifically found (Pet. App. A-52 to A-53, A-66) that the termination was properly effected pursuant to Handbook 3330.6. That the FAA also mentioned Handbook 3330.6A, which, if it had been in effect, would have yielded the same result, has no bearing on the fact that petitioner was properly terminated pursuant to Handbook 3330.6, which his employment agreement had incorporated.

c. Petitioner also asserts (Pet. 18, 20-21) that the FAA's decision not to permit him to remain at the Academy was an arbitrary change in policy, which constituted a breach of his contract and a denial of equal protection. These contentions are without merit because, as the Civil Service Commission responded in a letter to petitioner (Pet. App. A-64):

> The fact that all Instructors were not returned to their parent organization at the end of their second or third tour of duty does not alter the fact that it was within the discretion of the management of the agency, taking into consideration the pertinent facts in each case, to decide which Instructors would be retained and which would not be retained.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

LAWRENCE G. WALLACE
Acting Solicitor General

JULY 1981

---

[5]Petitioner claims (Pet. 15-16, 20) that the hearing examiner at the Civil Service Commission evidentiary hearing improperly denied his request to present witnesses who would testify concerning the FAA's return rights policy (see Pet. 15 n.5). As the Civil Service Commission Appeals Review Board found (Pet. App. A-53), however, the hearing examiner properly excluded this testimony "since the issue is not whether the program's interpretation has changed over the years, but only whether the agency had authority to do what it did in the case of this particular employee."